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In the Supreme Court of the United States

OCTOBER TERM, 1975

COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

MABY AKIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-940

COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 74-949

MARY AKIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. No. 74-940, 1a-15a; Pet. App. A, No. 74-949, 19-33) is reported at 504 F. 2d 115. The oral opinion of the district court (Pet. App. No. 74-940, 17a-21a; Pet. App. B, No. 74-949, 34-41) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1974. A timely petition for rehearing was denied on November 12, 1974. The petitions for writs of certiorari were filed on January 30, 1975, and February 1, 1975, respectively, and were granted on April 28, 1975. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the McCarran Amendment, 66 Stat. 560, 43 U.S.C. 666, which consents to the joinder of the United States as a defendant in general water adjudications, repealed by implication the jurisdiction of the federal district courts under 28 U.S.C. 1345 over suits by the United States for determination of water rights brought by it as trustee for certain Indian tribes, and as owner of various non-Indian government claims.

2. Whether the doctrines of abstention and comity permitted the district court to dismiss such an action filed by the United States and thereby to remit the claims involved, most of which are governed by federal law, to an after-filed state proceeding.[1]

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[1] If the Court disagrees with the government's contentions that the district court has jurisdiction, and that the doctrines of abstention and comity are inapplicable, then we believe it will become necessary for the Court to consider a third question alluded to in the government's brief in opposition to the petitions for writs of certiorari (pp. 10–12): whether the McCarran Amendment subjects Indian water rights for which the United States is trustee to the jurisdiction of state courts. This issue was raised, but not reached in the court below. See n. 8, p. 9, *infra*. This Court may consider it under the general principle that a judgment may be partially or entirely sustained on appeal on any ground, legal or factual, supported by the record. *Dandridge* v. *Williams*, 397 U.S. 471, 475, n. 6; *United States* v. *Carignan*, 342 U.S. 36, 38, n. 1.

STATUTE INVOLVED

The McCarran Amendment, Section 208, Department of Justice Appropriation Act, 1953, 66 Stat. 560, 43 U.S.C. 666, provides:

> (a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.
>
> (b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

(d) None of the funds appropriated by this title may be used in the preparation or prosecution of the suit in the United States District Court for the Southern District of California, Southern Division, by the United States of America against Fallbrook Public Utility District, a public service corporation of the State of California, and others.[2]

STATEMENT

This case involves claims by the United States as trustee for two Indian tribes, and in its own behalf, to use of the waters of the San Juan River and its tributaries, to the extent they flow through the southwest corner of the State of Colorado. A map showing the area and rivers involved is enclosed with this brief.

The San Juan River originates west of the continental divide in Colorado, but most of its 360-mile course is gradually westward through New Mexico and Utah, where it joins the Colorado River at Lake Powell. Tributary to the San Juan are a number of rivers rising in the mountains of southwestern Colorado, and generally flowing south or southwest through that State to join the San Juan in New Mexico. Among these are the Mancos, LaPlata, Animas, Florida, Los Pinos, Piedra and Navajo rivers. The entire system constitutes the San Juan basin, the principle watershed within Colorado's Water Division No. 7, as defined in that State's Water Right Determination and Administration Act of 1969, Colo. Rev. Stat. 37–92–201(1)(g) (1973). The system also drains the Ute Mountain Ute and Southern Ute Indian Reservations, which together occupy a strip of land in Colorado approximately 110 miles long, and 10 to 25 miles wide, running along the Colorado-New Mexico border from the Four Corners area[3] on the west to an eastern boundary in Archuleta County, Colorado. The San Juan National Forest also covers a substantial portion of the area north of the reservation.[4]

On November 14, 1972, the United States filed this civil action in the United States District Court for the District of Colorado "to have its rights and the rights of the Ute Mountain Ute and Southern Ute

[2] Section 208(d) is not reproduced in the United States Code.

[3] The junction of Colorado, New Mexico, Utah and Arizona.

[4] Also within Water Division No. 7 is the drainage basin of the Dolores River. The Dolores rises on the western slope of the Rockies, then curves gradually to the northwest to become a tributary of the Colorado in Utah.

The government has asserted claims to the waters of the Dolores in Colorado's District Court for Water Division No. 7, based upon Executive Orders creating the San Juan National Forest. Similar claims involving streams in the San Juan basin, which drain other parts of the Forest, have been joined with the Indian and non-Indian government claims asserted in the federal district court in this case. Petitioners' suggestion (Br. 6, n. 7) that the United States has improperly split its national forest claims between the state and federal courts overlooks the fact that its Dolores River claims involve a watershed geographically separate from the San Juan Basin, and do not involve Indian water rights. No Indian rights are involved in proceedings in other Colorado water divisions to which the United States is a party.

Indian tribes in and to the use of the waters [of the San Juan and its tributary rivers [5] in the State of Colorado] determined and declared" (Pet. App. 21a, 30a–31a). Jurisdiction was invoked under 28 U.S.C. 1345, which provides that "the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States * * *" (Pet. App. 31a). The complaint named, in alphabetical order, approximately 968 defendants, as well as all unknown claimants of interests in the waters involved (Pet. App. 21a–30a). Among these were certain water conservation districts that supply water to users.

The complaint alleged on behalf of the two Indian tribes that their present reservations were part of a larger reservation withdrawn and reserved for their use by the Ute Reservation Treaty of March 2, 1868; and that in fulfillment of the purposes for which the reservation was created, the waters in and on that reservation, including surface, ground and underground waters that were unappropriated on that date and that are or will become reasonably necessary for the present and future needs of the Indians, were withdrawn from private appropriation (Pet. App. 31a).

The complaint also set forth non-Indian claims of the United States. These included claims of reserved rights asserted to arise from: the establishment of the Mesa Verde National Park in 1906, the Yucca House National Monument in 1919, and the Hovenweep National Monument in 1928 (Pet. App. 32a–33a); the

[5] The Mancos, LaPlata, Animas, Florida, Los Pinos, Piedra and Navajo rivers.

reservation for public watering purposes of certain holes and springs located within the watersheds of the rivers (Pet. App. 33a); and the San Juan National Forest, as set aside for national forest purposes by a series of presidential proclamations beginning in 1905 and ending in 1947 (Pet. App. 34a–35a).

In addition, the complaint claimed priority in the right to use waters on certain lands administered by the Bureau of Land Management dating from the initiation of the various uses (Pet. App. 33a); priority for certain reclamation projects from the date the projects were initiated (Pet. App. 34a); and certain Indian rights to the use of waters of the Pine (Los Pinos) River as previously decreed by the federal district court in *United States* v. *Morrison Consolidated Ditch Co.*, D. Colo., Equity No. 7736, decided October 25, 1930 (Pet. App. 35a).

The complaint further alleged that the defendants claimed rights adverse to the rights of the United States and the Indian tribes and prayed for a decree adjudicating the reserved rights and priorities claimed. It also asked the court to appoint a water master to administer the waters adjudicated in the proceeding (Pet. App. 36a–37a, 40a).

Certain entities, not within the watershed of the San Juan, intervened [6] (A. 6–7).[7] After the complaint was served, defendant No. 812, the Southwestern

[6] The Colorado River Water Conservation District, the City and County of Denver, and Southeastern Colorado River Water Conservation District.

[7] "A." refers to the printed appendix in this Court.

Colorado Water Conservation District, filed an application in the Colorado State District Court for Water Division No. 7 requesting an order directing service of process on the United States under the McCarran Amendment, 66 Stat. 560, 43 U.S.C. 666, on the ground that the United States had filed this action in the federal district court (A. 2–3). On December 21, 1972, the state water judge ordered served on the United States a resumé of all water applications in Water Division No. 7 that had been filed during the month of November 1972 (A. 3). The Clerk for Water Division No. 7 mailed the resumé the following day (A. 4), and it was received by the Attorney General on January 2, 1973, and by the United States Attorney for the District of Colorado by personal service on January 3, 1973.

In the federal proceeding, motions to dismiss were filed by various party-defendants contending that the district court lacked jurisdiction because the McCarran Amendment, 66 Stat. 560, 43 U.S.C. 666, vested exclusive jurisdiction over water rights in the state courts; and that all claims by the United States should be asserted in the state water proceeding to which it had been made a party after the complaint was filed in federal court (*e.g.*, A. 10–11).

The district court announced its rulings on the motions to dismiss from the bench. It found it unnecessary to decide whether the state court had exclusive jurisdiction because it was satisfied under the doctrines of abstention and comity that it should defer to the state water court. It noted that the United

States has been served or was being served in Water Division No. 7, that the McCarran Amendment, 43 U.S.C. 666, waives the United States' immunity from suit in the state courts, and that the United States had filed claims in other water divisions in Colorado. The state proceedings, in the district court's view, were more convenient for local water users; the state courts are experts in Colorado water laws; deferring to the state court would avoid piecemeal litigations; and the state court can also vindicate federal rights (Pet. App. 17a–21a).[8]

On appeal by the United States, the court of appeals reversed. It held that the district court had jurisdiction and should not have abstained. In the court's view, the McCarran Amendment does not impliedly repeal the district court's jurisdiction under 28 U.S.C. 1345 over water rights claims aserted by the United States; rather, the Amendment was intended only to waive sovereign immunity. Its "purpose was to permit complete adjudication in a state court action and to prevent frustration of the parties because of inability to obtain jurisdiction over the United States" (Pet. App.

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[8] The United States filed a motion for reconsideration supported by the National Tribal Chairmans Association and the Native American Rights Fund as *amicus curiae*. Both in the district court and the court of appeals, the latter contended that state courts do not have jurisdiction over reserved Indian water rights. The United States argued that the doctrine of abstention was not applicable in any event, and that there is a serious question, whch need not be reached, whether the state courts have jurisdiction to adjudicate Indian water rights. The district court examined these contentions but declined to review its ruling. The court of appeals did not reach them.

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7a), which was not sufficient to find a repeal by implication of Section 1345.

Abstention, the court further ruled, was inappropriate in the circumstances of this case, which involves no constitutional questions that could be avoided by a state court's decision on a state law question; no interference with a state regulatory agency by premature decision of a federal constitutional question; and no novel or important issues of state law. When state and federal courts have concurrent jurisdiction over property questions, the court noted, priority in filing is recognized. Moreover, when the United States, as a plaintiff, seeks to establish rights of a national and sovereign character, this militates against abstention. Finally, the court held that *United State* v. *District Court for Eagle County,* 401 U.S. 520, does not even suggest abstention is appropriate; rather, it recognizes that reserved water rights claims of the United States present federal questions (Pet. App. 1a–15a).

INTRODUCTION AND SUMMARY OF ARGUMENT

A. INTRODUCTION

Since the Judiciary Act of September 24, 1789, 1 Stat. 73, which gave the lower federal courts original jurisdiction over suits by the United States, the federal government has been entitled to sue as plaintiff in its own courts for the adjudication of any civil claims it may wish to assert. This jurisdiction is one of the indispensable categories in even a minimum model for a federal judicial system. From the beginning it was recognized that the federal government required a judi-

cial machinery for enforcing its own claims and safeguarding its agents against the obstructions and prejudices of local authority. See Hart and Wechsler's, *The Federal Courts and the Federal System* 14, 28–29, 34, 1293–1295 (2d ed. 1973).[9] In its present form, 28 U.S.C. 1345, this jurisdiction extends to civil claims by the United States of every nature, including suits to determine water rights owned by the United States or held by it as trustee for Indian tribes. This Court recently so held in *United States* v. *Nevada,* 412 U.S. 534, an original suit filed by the United States for the purpose of determining reserved water rights to protect the Indian fishery at Pyramid Lake, Nevada. The Court declined to exercise its original jurisdiction, however, holding instead that "the existence and extent of the prior water rights of the United States with respect to the Pyramid Lake Indian Reservation is within the jurisdiction of the District Court." 412 U.S. at 538.[10]

Nevertheless, petitioners claim here that by waiving sovereign immunity in the McCarran Amendment, 43 U.S.C. 666, and permitting joinder of the United States as a defendant in water suits, Congress either repealed by implication the affirmative jurisdiction of the federal courts under 28 U.S.C. 1345; or, at least,

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[9] See also Friendly, *Federal Jurisdiction: A General View* 9 (1973) (quoting from Frankfurter & Landis, *The Business of the Supreme Court* (1928).

[10] To the extent that disputes with California might arise "with respect to United States water uses in that State" the Court also held that they could "be settled in lower federal courts in California." 412 U.S. at 539–540.

indicated that the federal courts were to defer jurisdiction to the state courts in water rights disputes under the doctrines of abstention and comity. As a practical matter, there is no difference between the contentions. Abstention in cases where the United States is subject to suit in state court under the McCarran Amendment would amount, in effect, to a repeal of the district court's jurisdiction. At the least, it would deprive the United States of the right to choose a federal forum for the adjudication of federal claims since, according to petitioners, the United States can be forced to litigate in a state court if the state joins the federal government in the state proceedings after the filing of the federal suit.

Petitioners' arguments must be assessed against the claims alleged by the United States in the complaint. For the most part, the claims are under the federal reserved rights doctrine, not under state water law. Colorado, like most other western States, applies the appropriative rights doctrine to the use of water.[11] That doctrine is a product of the practices developed in mining, and extended to irrigation by settlers in the dry western States. Under it, a party acquires an enforceable legal right to use water only upon actually diverting it from its natural source and applying it to a beneficial use.

This water right dates from the actual diversion (state law may grant conditional rights while diversion facilities are constructed), and has priority over subsequent rights in periods of shortage. It survives only so long as the water is put to an actual beneficial use. See *Arizona* v. *California,* 373 U.S. 546, 555–556.

In contrast to the western States' law of prior appropriation[12] is the federal reserved rights doctrine originally applied to Indian reservations in *Winters* v. *United States,* 207 U.S. 564, and held to be equally applicable to non-Indian federal establishments in *Arizona* v. *California, supra,* 373 U.S. at 601. The reserved rights doctrine traces its origin to the right of the United States, as owner of the public lands, to the beneficial use of the waters therein. See *Winters* v. *United States, supra,* 207 U.S. at 577; *United States* v. *Rio Grande Dam & Irrigation Co.,* 174 U.S. 690, 703. Under these decisions the United States as trustee of the property of reservation Indians, and as owner of other types of reservations, is deemed to have reserved, at the time it withdrew the lands from private appropriation, sufficient water to achieve the purpose for which the lands were set aside. Such reserved federal water rights, as this Court held in *United States* v. *District Court for Eagle County,* 401 U.S. 520, 526, arise under federal law.

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[11] *Coffin* v. *Left Hand Ditch Co.*, 6 Colo. 443; Colo. Constitution, Art. XVI, Secs. 5, 6; Colo. Rev. Stat. 37–92–102 (1973); see generally National Water Commission, *A Summary-Digest of State Water Laws*, Part II, Chap. 6 (1973).

[12] The appropriative rights doctrine contrasts with the other principal state water doctrine, based on riparian rights, which obtains chiefly in the plentifully watered eastern states. The riparian doctrine permits a landowner whose property abuts a body of water to make a reasonable use of the water so long as he does not interfere with other riparians. See Trelease, *Water Law* 10–13 (2d ed. 1974); *Summary-Digest*, *supra*, n. 11, at Part I, pp. 3–8.

Federal reserved rights differ from state appropriative rights in that they are not created by permits or adjudications in conformity with state procedures; they do not depend upon actual diversion to a beneficial use; they are not terminated by abandonment; the quantity of water involved depends on the purpose of the reservations; and the priority dates from the time the land was withdrawn for national purposes.

Because the principal claims by the United States in this case involve claims of reserved water rights on behalf of Indians and on behalf of the United States in its own right, it is particularly appropriate that these claims be adjudicated by the federal district courts. As we discuss below, the McCarran Amendment did not change, for water rights, the fundamental decision of the First Congress that suits by the United States were among "those causes which are manifestly proper for the cognizance of the national judicature." *The Federalist* No. 81, quoted in Hart and Wechsler, *supra,* at 29.

B. SUMMARY OF ARGUMENT

1. The McCarran Amendment does not repeal by implication the historic jurisdiction of the federal courts over suits by the United States under 28 U.S.C. 1345.

On its face the Amendment sets forth only a waiver of sovereign immunity and neither confers nor repeals jurisdiction. Its limited purpose—to remove the bar of sovereign immunity in order to permit determination of water rights owned and used by the federal government—is achieved as effectively when the United

States sues in federal court as when it is joined as a defendant in state courts.

The legislative history gives no indication that Congress intended to preclude the United States from asserting water rights claims in its own courts. Not even a hint of such a purpose appears in Senator McCarran's descriptions of his bill, or the Senate Report on it (S. Rep. No. 755, 82d Cong., 1st Sess. (1951)), or the proceedings in the Senate, which substituted Senator McCarran's bill for a more drastic restriction in the House-passed 1953 appropriation for the Department of Justice. While a Department of Justice witness predicted in testimony opposing the legislation a series of adverse consequences if the bill were enacted, even he did not indicate that the bill would repeal the government's right to sue affirmatively. In any event, testimony in hearings by zealous opponents of legislation is not authoritative.

The unexplained elimination from Senator McCarran's original proposal of a provision permitting removal from state to federal courts concerned only water rights suits in which the United States is joined as a defendant, not the original jurisdiction of the district courts under Section 1345. And finally, when the McCarran Amendment was before Congress, there were also pending a number of proposals, including one passed by the House of Representatives, which would have barred federal officials from asserting any water rights except in conformity with state law. Congress instead adopted the limited waiver of immunity in the McCarran Amendment.

Repeals of federal statutes by implication are disfavored and will be found only in the face of irreconcilable conflict between an earlier and a later act of Congress. The only possible conflict to which petitioners point (which is illusory, as we discuss later) is between the federal courts' historic jurisdiction over affirmative suits by the United States, and the provisions of Colorado's 1969 water rights act. Federal statutes, especially basic jurisdictional grants, are not repealed by implication from later state laws. Petitioners' arguments, which for these cases would repeal both Section 1345, and the federal question jurisdiction of Section 1331(a), which the United States could also invoke, were properly rejected by the court of appeals.

2. Neither the doctrines of abstention nor comity warrant refusal by a federal district court to exercise its jurisdiction over a government water rights suit [illegible] in deference to an after-filed proceeding in state court. Such an approach would permit defendants in every federal water rights suit to remove it to state court by answering the complaint with a proceeding naming the United States a defendant in state proceedings. A federal court with jurisdiction over a suit by the United States turning on nonconstitutional federal law, and involving no controlling, unsettled doctrines of state law, should not abstain in order that the state courts may decide the federal issues subject to ultimate review in this Court.

Abstention is an exception to federal jurisdiction and is carefully limited to special circumstances. It is invoked only in cases turning on unsettled issues of

state law, when state law or state administrative action is directly challenged under the federal Constitution, and authoritative construction of the state law by the state courts might avoid decision of the constitutional question; or when abstention would avoid federal formulation of state policy by allowing the state courts the initial opportunity to review state agency action under state law. The Indian and federal government water rights claims in this case turn on federal law under the reserved rights doctrine defined in *Winters* v. *United States*, 207 U.S. 564, and *Arizona* v. *California*, 373 U.S. 546, 595–601. No challenge to state administrative action is involved. This case is thus governed by the rule that recognizes the right of the plaintiff in a civil case to choose a federal forum, when there is a choice, even if the issues are of substantial local interest. This rule is historically appropriate where the United States is the plaintiff.

The doctrine of comity defined in *Younger* v. *Harris*, 401 U.S. 37, is also inapplicable. It is founded on the traditional rule against interference by federal courts in a state's enforcement of its criminal laws, and on the view that federal-state relations are enhanced when state courts are permitted to make the initial decision on the constitutionality of state laws.

3. There are a number of practical benefits resulting from affirmative water rights suits by the United States in federal court. First, unlike the state courts, the federal courts have undoubted jurisdiction over Indian water rights held by the United States as trustee. Thus, a federal suit permits a complete ad-

judication of water rights held by the government for its wards, as well as those owned for federal use.

Second, the federal proceeding permits determination of the complicated issues of federal law involving Indian and federal government water rights by an experienced federal tribunal, expert in construing Indian treaties and federal land laws and orders. Injection of such issues into state court proceedings confronts state water judges with issues alien to the simpler questions of priority under state law customarily arising in state water adjudications. Because of their complexity, the federal issues must be separated from the ordinary proceedings in any event. This separation is conveniently accomplished when such issues are raised by the United States as plaintiff in federal court.

Third, such federal suits can be appealed from the district courts to the federal courts of appeals, thus relieving the burden on this Court, which would otherwise be the only federal forum for appellate review of the federal issues.

Fourth, once the Indian and government water rights have been determined by the federal court, its decree can be integrated into the overall tabulation of past decrees to be incorporated into state general adjudications, just as past state decrees are included. Indeed, Colorado's Water Right Determination and Administration Act of 1969 provides both a month-by-month procedure for the determination of new applications for water rights, and a procedure for overall tabulation of all decreed rights, including federal decrees, for each stream and watershed. By 1982 these

tabulations are to be completed and then confirmed by an overall decree in each state Water Division, which will complete the state's process of general adjudication.

4. The Court need not decide whether the state courts have jurisdiction over Indian water rights held by the United States as trustee unless it concludes that the district courts do not have jurisdiction over government suits for non-Indian water rights under 28 U.S.C. 1345, or that the doctrines of abstention and comity permit the district courts to refrain from exercising that jurisdiction in order to remit water rights claims by the United States in its own behalf to the state courts. Historically, Indians have had a special relationship with the federal govenment devolving from their aboriginal sovereign status to their present condition as wards of the nation. In performing its fiduciary obligation to protect Indians' tribal rights and property, Congress has permitted the states to exercise civil jurisdiction over Indians only by express enactments adopted after careful consideration, and subject to precise limitations. The McCarran Amendment does not mention Indian water rights, and its history does not reflect a comprehensive consideration of the subject. Moreover, a year after adopting the Amendment, Congress passed Pub. L. 280 (Act of August 15, 1953, 67 Stat. 589), which expressly excluded from its authorization of civil jurisdiction by the States the power to adjudicate Indian water rights held by the United States as trustee. Such rights therefore can be put in issue only in suits by the United States as plaintiff on benalf of the Indians under 28 U.S.C. 1345.

ARGUMENT

I

THE McCARRAN AMENDMENT DID NOT BY IMPLICATION REPEAL THE RIGHT OF THE UNITED STATES TO SUE IN THE FEDERAL DISTRICT COURTS FOR A DETERMINATION OF WATER RIGHTS CLAIMED BY INDIAN TRIBES AND BY THE GOVERNMENT

A. ON ITS FACE THE AMENDMENT'S LANGUAGE DISCLOSES NO PURPOSE OTHER THAN TO WAIVE SOVEREIGN IMMUNITY

The McCarran Amendment expresses no purpose other than to grant consent for the joinder of the United States as a defendant in suits for the adjudication of water rights of which it is the owner, or which it is in the process of acquiring. The Amendment makes no reference to the role of the United States as a plaintiff in such suits. Although it refers to state law, it does not distinguish between state and federal courts. Moreover, unlike other statutes waiving sovereign immunity,[13] it contains no grant of jurisdiction to any court. At most, it enables the state courts to exercise jurisdiction, *concurrent* with the federal courts, over water rights suits involving the United States, by permitting the United States to be joined as a defendant in state proceedings. But this permission to join the United States is scarcely a declaration that the United States can assert its claims as plaintiff or defendant only in conformity with state procedures in state courts.

[13] See, *e.g.*, the Tucker Act, 28 U.S.C. 1346(a); the Federal Tort Claims Act, 28 U.S.C. 1346(b); and 28 U.S.C. 2410 (actions affecting property on which the United States has a lien).

Even as a waiver of immunity, the McCarran Amendment is limited. It does not authorize the joinder of the United States in original suits in this Court involving the right of States to use the water of any interstate state stream (Section 208(c)); and it is confined to suits for a general adjudication of water rights—that is, a comprehensive proceeding in which the relative rights of all parties claiming water from a stream or other source are adjudicated *inter sese,* as distinguished from a proceeding in which one party is seeking to establish or defend its rights. *Dugan* v. *Rank,* 372 U.S. 609, 617–619.[14]

In addition, the Amendment purports to waive sovereign immunity only when it appears that the United States is the owner or is in the process of acquiring the water rights. It makes no mention of Indian rights (see discussion, *infra,* pp. 52–62).

The Amendment's language and limitations thus indicate its limited purpose: to assure that the sovereign immunity of the United States could not be asserted to prevent a complete determination of all rights to use a stream in the process of general adjudication prevailing in many states. See *United States* v. *District Court for Eagle County,* 401 U.S. 520; *United States* v. *District Court for Water Div. No. 5,* 401 U.S. 527. As the court below stated, the Amendment was intended "to prevent frustration of the parties because of inability to obtain jurisdiction over the United States" (Pet. App. 7a).

[14] This suit, which seeks only to establish the rights of the United States, is not a general adjudication within the meaning of *Dugan* v. *Rank*, *supra*.

When, as here, the United States sues as plaintiff, in a federal court, that purpose is satisfied, for the basic issue to be litigated under the McCarran Amendment—the existence and extent of federal, non-Indian "appropriative rights, riparian rights, and reserved rights" (*Eagle County, supra,* 401 U.S. at 524)—is laid before the court as effectively as when the United States is joined as a defendant under the McCarran Amendment.

This is confirmed by the final section. The McCarran Amendment is so called because it was adopted as an amendment to the Department of Justice Appropriation Act, 1953, 66 Stat. 560. Subsection (d) of the Amendment barred the use of appropriated funds "in the preparation or prosecution of the suit in the United States District Court for the Southern District of California, Southern Division, by the United States of America against Fallbrook Public Utility District * * * and others." This limitation arose out of claims by the United States to the use of water from the Santa Margarita River for the Marine Base at Camp Pendleton, California.[15] See discussion, *infra,* pp. 27–28. If the McCarran Amendment had repealed the jurisdiction of the federal district courts under 28 U.S.C. 1345 to entertain suits by the United States for the determination of water rights, it would have been unnecessary for Congress to bar the use of Department of Justice funds to carry on the Santa Margarita litigation.

[15] See *United States* v. *Fallbrook Public Utility District*, 101 F. Supp. 298; 108 F. Supp. 72; 109 F. Supp. 28 (S.D. Cal.).

B. THE LEGISLATIVE HISTORY CONFIRMS THE AMENDMENT'S LIMITED PURPOSES

The legislative history of the McCarran Amendment further confirms that, as proposed and enacted, the bill's only purpose was to permit involuntary joinder of the United States as a defendant in general adjudications of water rights. This narrow legislation was enacted in preference to other legislation which would have expressly barred the government from federal courts in water cases. The option of an affirmative suit by the United States under 28 U.S.C. 1345 was thus preserved.

As introduced by Senator McCarran at the opening of the 82d Congress (S. 18, 82d Cong., 1st Sess., 97 Cong. Rec. 86 (1951)), the bill expressed only a consent to joinder of the United States as a defendant in water right suits in words identical to the statute as finally enacted.[16] As introduced, S. 18 also contained a proviso expressly providing for removal of such suits to the federal district courts.

The Senate conducted hearings on S. 18,[17] and petitioners place their principal reliance on them. They particularly emphasize the testimony of the Department of Justice representative, William H. Veeder, then a Special Assistant to the Attorney General. Mr. Veeder strongly opposed the bill, contending in the

[16] A predecessor to S. 18 was introduced by Senator McCarran in the preceding Congress on July 21, 1949. S. 2305, 81st Cong., 1st Sess., 95 Cong. Rec. 9918. No action was taken on this bill.

[17] Hearings on S. 18 ("Adjudication of Water Rights" before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 1st Sess. (1951) (hereinafter, "Senate Hearings").

broadest possible terms that it would lead to a series of consequences which would disrupt amicable state-federal relations in water matters, create enormous litigation problems, and threaten loss of a wide range of invaluable federal water rights. The Department of the Interior also opposed the bill.[18]

[18] Mr. Veeder argued that the bill was unnecessary because, when negotiations failed, federal claims were usually determined in affirmative suits brought by the United States as plaintiff in federal court, or by special appearance in state court, at the request of interested private parties (Senate Hearings 2, 3). A major concern, reflected in the questions of Senator Watkins of Utah, was that this remedy, which depends upon the discretion of executive officers, was uncertain (*id.* at 7, 18). Mr. Veeder also contended that the bill's removal provision would lead to a dual procedure in which federal courts superseded the existing state procedure, and would require the small user to litigate, for example, in Denver, where the federal court sits, instead of in his local tribunal. He also contended that the bill would lead to a multiplicity of suits that would require the United States to prove its forestry, reclamation, Indian, and soil conservation rights in one suit, or risk a determination of *res judicata* for having split its cause of action (*id.* at 5–7).

By letter to the Committee, the Department of Justice, over the signature of Deputy Attorney General Ford, confined its opposition to the contention that a general waiver would result in piecemeal adjudications and a multiplicity of actions (*id.* at 66).

In its letter, the Department of the Interior pointed to the wide variety of federal water interests, ranging from Commerce Clause and Indian rights, to such matters as national parks and reclamation. It recommended that any waiver of immunity should be limited to rights claimed under state law in a general adjudication, or in judicial review proceedings of state administrative proceedings invoked by federal officials. This proposal was to be further limited by barring equitable relief or costs against the United States; and by providing that the United States would not be prejudiced by prior decrees to which it was not a party, and that the waiver should not extend to rights asserted by the United States for and on behalf of Indians (*id.* at 67–68).

There is no indication in either submission that opponents of the bill in the executive branch believed that affirmative suits by the United States were foreclosed. The statements in opposition were confined to the wisdom of waiving the government's immunity to suit.

In any event, the testimony and letters before the Senate Committee are of little assistance in ascertaining the intent of Congress. The Court has frequently warned against reliance on testimony in committee hearings, except for precise analyses of statutory phrases by sponsors of the proposed laws. *S & E Contractors, Inc.* v. *United States,* 406 U.S. 1, 13, n. 9. The Court also has "often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach. 'The fears and doubts of the opposition are no authoritative guide to the construction of legislation.' " *National Labor Relations Board* v. *Fruit Packers,* 377 U.S. 58, 66.

Neither Mr. Veeder's testimony nor the opposition letters submitted by the Departments of Justice and Interior persuaded the Senate Committee. It favorably reported the bill (S. Rep. No. 755, 82d Cong., 1st Sess. (1951)), and recommended its passage as amended in the Committee. The precise purpose of the bill was concisely stated (S. Rep. No. 755, *supra,* at 5):

> Congress has not removed the bar of immunity even in its own courts in suits wherein

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> water rights acquired under State law are drawn in question. The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity.

The provision permitting removal (p. 23, *supra*) was eliminated without comment. The principal amendments were addition of a proviso, suggested by the National Reclamation Association (Senate Hearings 32), barring joinder of the United States as defendant in suits before this Court involving the right of States to use the water of any interstate stream; and a provision, suggested by Senator Magnuson, calling for a complete catalogue of federal water rights (S. Rep. No. 755, *supra,* at 6).

The report gave no indication that it considered Mr. Veeder's rather extreme characterizations of the bill's effects to be accurate. Instead, it simply declared (S. Rep. No. 755, *supra,* at 2): "The committee has taken note of the reports of the Department of Justice and the Department of the Interior printed below which oppose the legislation, but has concluded, after a consideration of all of the evidence available to the committee, that the legislation is meritorious." These reports were the letters the agencies had sent (n. 18, *supra,* p. 24).

There was no debate on the Senate floor. In attempts to obtain unanimous consent for its consideration, Senator McCarran explained the bill in terms substantially identical to the Senate Report. 97 Cong. Rec. 12391, 12947–12948 (1951). After objections to its consideration were withdrawn (98 Cong. Rec. 7793

(1952)), it was taken up by the Senate. The Committee amendments were adopted, and the bill was passed without comment. 98 Cong. Rec. 7817–7818 (1952).[19]

No action was taken on S. 18 in the House until it was ultimately substituted for Section 208 of H.R. 7289, 82d Cong., 2d Sess. (1952), which included the 1953 Department of Justice Appropriation Act. When that bill reached the floor of the House, Congressman Yorty of California (who had appeared before the Senate Committee to explain his opposition to the government's Santa Margarita litigation (Senate Hearings 37–44), proposed an amendment to bar the use of funds to be appropriated "in the preparation or prosecution of any suit or proceeding in any court by or on behalf of the United States (1) against a state of the Union; or (2) against in excess of twenty-five hundred defendants." 98 Cong. Rec. 3555 (1952). This proposal was adopted as part of the appropriation bill by the House. 98 Cong. Rec. 3556, 3562–3563 (1952).

When the appropriation bill came before the Senate Appropriation Committee, S. 18 was discussed in connection with general water rights problems.[20] Without explanation the Senate Report on the appropriation bill (S. Rep. No. 1807, 82d Cong., 2d Sess. 10 (1952))

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[19] S. Rep. No. 755 was supplemented by a Part 2 clarifying the phrasing of the proviso barring joinder of the United States in this Court. S. Rep. No. 755, Part 2, 82d Cong., 2d Sess. (1952).

[20] Hearings on H.R. 7289 ("Department of State, Justice, Commerce and the Judiciary Appropriation for 1953") before the Subcommittee of the Senate Committee on Appropriations, 82d Cong., 2d Sess. 1349–1350, 1802–1807 (1952).

recommended that S. 18 be substituted for Section 208 of the House Appropriation Bill. Senator McCarran offered S. 18 as an amendment from the floor (98 Cong. Rec. 7893 (1952)),[21] and it was adopted, with an addition proposed by Senator Knowland, implementing Congressman Yorty's proposal barring the use of funds appropriated in the bill to finance the Santa Margarita litigation (98 Cong. Rec. 8110 (1952)).

As already noted (p. 22, *supra*), the Knowland addition would have been unnecessary if other provisions of the McCarran Amendment had been intended to foreclose affirmative suits by the United States.[22]

Far from indicating a purpose to deprive the United States of access to federal courts in water rights matters, the history shows that Congress declined to enact such proposals. First, in the Senate Hearings the National Reclamation Association affirmatively urged legislation requiring the United States to assert its claims in state proceedings and nowhere else (Senate Hearings 22). Second, there was pending in the House, at the time S. 18 was before it, legislation (H.R. 7691, 82d Cong., 2d Sess. (1952)) expressly requiring federal officers to act only in conformity

[21] The Amendment, however, did not include Section 2 of S. 18 directing the Secretary of Interior to list all federal water rights.

[22] After several unsuccessful conferences on the appropriation bill (H.R. Conf. Reps. Nos. 2454 and 2485, 82d Cong., 2d Sess. (1952)), the House accepted the Senate version (98 Cong. Rec. 9445–9446 (1952)). Despite opposition on the floor by Congressman Rooney principally addressed to the Santa Margarita restriction contained in Section 208, that provision remained in the bill (98 Cong. Rec. 9445–9446 (1952)); the bill as adopted was approved by the President as Pub. L. 495, 82d Cong., 66 Stat. 549, 560.

with the procedures provided by state law and no other; and declaring that the United States "shall sue and be sued in the State courts." To the same effect was H.R. 5735, 82d Cong., 1st Sess. (1951), which would have required federal officers to "proceed in conformity with" the water law of the western states, and which was intended "to make it unmistakably clear that * * * jurisdiction * * * is subject to the laws of the affected state * * *." H.R. Rep. No. 1452, 82d Cong., 2d Sess. 2 (1952). Finally, the House passed a bill, H.R. 5368, 82d Cong., 1st Sess. (1951), which, in Section 4, required federal officers to "proceed in conformity with the laws [of the] States * * *," (98 Cong. Rec. 5046–5055 (1952)); but this bill was not adopted by the Senate.

Congress thus had before it a number of proposals that would have expressly cut off the right of the United States to assert its water rights in the federal courts, but it adopted the narrower provisions of the McCarran Amendment, which simply waived sovereign immunity.[23]

[23] The limited nature of the McCarran Amendment dissatisfied many in the western states. It was followed by repeated proposals in succeeding Congresses to bar federal officers and agencies from asserting claims for water rights except in conformity with state law, and to place limitations on the reserved rights doctrine. See Morreale, *Federal-State Conflicts Over Western Waters: A Decade of Attempted "Clarifying Legislation,"* 20 Rutgers L. Rev. 423 (1966). In 1968 Congress created the National Water Commission to review and report on nationwide water resources problems. National Water Commission Act, 82 Stat. 868. Its report, submitted in 1973, recommended a "National Water Rights Procedures Act" which would require the United States to proceed in conformity with state law, subject to review of state trial court or administrative orders in the federal

Petitioners contend (Br. 34–35) that the elimination of the removal provision in S. 18 signifies that Congress intended to bar affirmative suits by the United States. At most it indicates that once the United States is joined as a defendant in a state proceeding, it cannot remove the entire general adjudication from the state court to the federal court. Moreover, it is probable, indeed likely, that the Senate Committee deemed the removal provision unnecessary in view of 28 U.S.C. 1441(a), which permits removal of "any civil action brought in a State court of which the district courts * * * have original jurisdiction." [24] When Congress intends to foreclose the right of removal to the United States and its instrumentalities, it does so in express language. See, *e.g.*, 28 U.S.C. 1445 (a) and (b); 46 U.S.C. 688; 12 U.S.C 1138; 15 U.S.C. 77v. It

courts of appeals. The proposed rule of conformity would not apply to Indian water rights or when state law conflicts with accomplishment of federal programs. Final Report of the National Water Commission 462—463 (1973).

If the McCarran Amendment already required conformity with state procedures, thus barring suits in federal court, the conformity proposals in the Commission's report, and in the legislation described by Professor Morreale, would have been unnecessary.

[24] Whether this provision permits removal of a water adjudications suit against the United States under the McCarran Amendment is presently being litigated. One district court has held that such suits are not removable because they are not within the federal courts' original jurisdiction. *In re Green River Drainage Area*, 147 F. Supp. 127 (D. Utah). The contrary view is that all suits against the United States arise under federal law. 1A Moore's *Federal Practice*, pp. 359–360, n. 6 (2d ed. 1974); American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 260 (1969); *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 610 (concurring opinion of Justices Rutledge and Murphy).

has not done so here, and it has not taken the further drastic step of barring the United States from initiating water suits in federal courts. Had it intended the latter result, there can be little doubt that it would have expressly so provided in the McCarran Amendment. It would have been equally explicit if it had intended, as petitioners claim (Br. 34–35), to authorize defendants in federal court water rights suits brought by the United States to remove them to state court simply by naming the United States a defendant in the state proceeding, after they were served with the federal complaint.

C. NO BASIS EXISTS FOR INFERRING A REPEAL BY IMPLICATION

Petitioners concede (Br. 29–30) that the United States may continue to sue as a plaintiff or intervenor in state courts. Their further argument that the McCarran Amendment was intended to require the federal government to assert its water rights exclusively in state courts is essentially a contention that 28 U.S.C. 1345 was repealed by implication. There is nothing to support this contention.

It is a cardinal rule that repeals by implications are not favored, and that only when there is an irreconcilable conflict between an earlier and later statute will the Court conclude that Congress intended such a result. *Gordon* v. *New York Stock Exchange*, No. 74–304, decided June 26, 1975 (slip op., pp. 22–23); *Morton* v. *Mancari*, 417 U.S. 535, 549–551. Indeed, "[w]hen there are statutes clearly defining the jurisdiction of the courts the force and effect of such provisions should not be disturbed by a mere implication

flowing from subsequent legislation." *Rosencrans* v. *United States*, 165 U.S. 257, 262.

As we have discussed above, no intent to repeal 28 U.S.C. 1345 can be found either in the language of the McCarran Amendment or in its legislative history. Nor does an irreconcilable conflict exist between the two statutes. The only conflict to which petitioners allude is between the Colorado Water Right Determination and Administration Act of 1969 (Colorado Revised Statutes, 1973, Title 37, Article 92) and Section 1345 of the Judicial Code (Br. 31–34). But if a repeal by implication is to be found, it must be based upon conflicts between two federal laws, not upon inconsistencies between federal law and state law. The McCarran Amendment applies, literally, to any suit for the adjudication of water rights, in all fifty States. State water laws vary widely, see National Water Commission, *Summary-Digest, supra,* n. 11, and the extent of repeal of 28 U.S.C. 1345 surely cannot depend on the adequacy of varying state procedures for a determination of water rights.

Moreover, petitioners' contentions would result in the repeal by implication not of one major jurisdictional grant, but of two. Quite apart from the right of the United States to invoke the historic jurisdiction defined by 28 U.S.C. 1345, the water rights claims asserted by it in this case fit comfortably within the general federal question jurisdiction conferred on the district courts by 28 U.S.C. 1331(a). Yet, according to petitioners' analysis, the McCarran Amendment would also have to be deemed to have impliedly repealed Section 1331(a) as well as Section

1345, although there is no conflict and not the slightest indication that Congress intended such a drastic change in the jurisdiction of the federal courts.[25]

II

THE DOCTRINES OF ABSTENTION AND COMITY ARE INAPPLICABLE IN THIS CASE AND THUS CANNOT BE INVOKED SO THAT THE FEDERAL COURT MAY AVOID DECIDING THE FEDERAL QUESTIONS PRESENTED BY THE UNITED STATES

1. Even a cursory review of the complaint in this case (Pet. App. 21a–40a) demonstrates that the principal claims before the district court involve questions of federal law under the reserved rights doctrine. See *United States* v. *District Court for Eagle County, supra,* 401 U.S. at 526. Although these federal questions are not dependent on state law, petitioners nevertheless assert that the United States should be forced to present and litigate these issues in the state proceeding because, *after* the United States filed its federal complaint, one of the defendants to the federal action responded by joining the United States as a party to the monthly proceedings in Water Division No. 7 (see pp. 7–8, *supra*). The contention that in these

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[25] Petitioners' argument is particularly anomalous in light of the fact that they apparently would continue the federal courts' jurisdiction under Section 1331(a) over suits *against* the United States for the determination of water rights held by the United States. One of the *amici curiae*, the State of New Mexico, indeed, has brought a number of such suits, (listed at p. 9 of our Brief in Opposition). Thus, petitioners would leave the federal courts open for the determination of Indian and federal government water rights to everyone except the United States.

circumstances the federal courts should abstain, thereby depriving the United States of its choice of a federal forum and conferring upon petitioners what is in effect a right of removal, is extraordinary; it gains no support from the decisions of this Court concerning the abstention doctrine or principles of comity; and the court of appeals properly rejected it.

While the Court has frequently divided over whether a particular case presented an appropriate occasion for abstention,[26] the doctrine has generally been confined to cases, such as *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, in which state law may affect the disposition of a constitutional question and the state law is so uncertain that an immediate federal decision would not be appropriate, see *Harris County Commissioners Court* v. *Moore*, 420 U.S. 77. Indeed, in *Wisconsin* v. *Constantineau*, 400 U.S. 433, 438 (and *Reetz* v. *Bozanich*, 397 U.S. 82, 86), the Court held that "the abstention rule *only* applies where 'the issue of state law is uncertain.' *Harman* v. *Forssenius*, 380 U.S. 528, 534" (emphasis added).

No such state issues are presented in this case. The major claims involved are federal and are not dependent upon state law. To the extent that federal law incorporates state law as the rule of decision for other claims alleged in the complaint (compare Section 8 of the Reclamation Act of June 17, 1902, 32 Stat. 390, 43 U.S.C. 383, with complaint, para. X (Pet. App. 34a)),

[26] See, *e.g.*, *Burford* v. *Sun Oil Co.*, 319 U.S. 315; *Louisiana Power and Light Co.* v. *City of Thibodaux*, 360 U.S. 25; *Allegheny County* v. *Frank Mashuda Co.*, 360 U.S. 185.

there is no uncertainty in the basic state law[27]—and petitioners do not argue otherwise.[28]

Moreover, the abstention doctrine, which relieves the federal courts of their duty to decide cases within their jurisdiction, has been confined to "narrowly limited 'special circumstances.'"[29] The general rule is that "[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction * * *. The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *Willcox* v. *Consolidated Gas Co.*, 212 U.S. 19, 40, quoted with approval in *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415.[30] Otherwise the basic purpose of the grants of original jurisdiction to federal courts—to provide a neutral forum staffed by independent judges who, free from

[27] Even when the constitutionality of the state law is dependent upon the construction of that law, the Court has held abstention to be inappropriate if the meaning of the state law was not unsettled or uncertain (*Chicago* v. *Atchison, T. & S. F. Ry.*, 357 U.S. 77; *Doud* v. *Hodge*, 350 U.S. 485, 487; *Toomer* v. *Witsell*, 334 U.S. 385), or if resolution of unsettled state law would not avoid the constitutional issue (*Baggett* v. *Bullitt*, 377 U.S. 360, 375–378).

[28] Even if there were uncertainty, the Court has held that "[w]here a case involves a nonconstitutional federal issue, however, the necessity for deciding which depends upon the decision on an underlying issue of state law, the practice in federal courts has been, when necessary, to decide both issues." *Propper* v. *Clark*, 337 U.S. 472, 490.

[29] *Zwickler* v. *Koota*, 389 U.S. 241, 248, quoting *Propper* v. *Clark*, 337 U.S. 472, 492; *Harris County Commissioners Court* v. *Moore*, *supra*, 420 U.S. at 83.

[30] See also *Cohens* v. *Virginia*, 6 Wheat. 264, 403–404 (Marshall, C. J.); cf. *Zwickler* v. *Koota*, *supra*, 389 U.S. at 248.

local prejudice, can decide cases raising federal questions, suits by and against the United States, and diversity cases—would be defeated.

When, as here, the federal suit not only involves federal questions but also has been brought by the United States, the constraints on the federal courts to decide the case rather than defer to the state court are even stronger. At a minimum, federal courts should be—and throughout this nation's history, have been—open to adjudicate suits brought by the sovereign to enforce its laws or determine its civil claims.[31] Indeed, the right of the United States to sue in its own courts is considered to be of such paramount importance that the American Law Institute has recommended that abstention not be permitted in actions brought by the federal government, even when there are underlying issues of unsettled state law. American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 50, 298 (1969).

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[31] See Friendly, *Federal Jurisdiction: A General View* 8–9 (1973). In describing a minimum model of federal jurisdiction, Judge Friendly ranks suits by the United States as having the highest priority. He there quotes (*id.* at 9) the following statement from Frankfurter & Landis, *The Business of the Supreme Court* 10 (1928):

"When the Constitution enabled the central government to secure ways and means for its subsistence by going directly against the individual citizen instead of depending on the largess of the states, it was inevitable that power should be written into the Constitution whereby the Federal Government could fashion its own judicial machinery for enforcing its own claims and safeguarding its agents against the obstructions and prejudices of local authorities."

Thus, in cases within the district court's jurisdiction over suits by the United States or its officers (28 U.S.C. 1345), the court will decide both questions of state and federal law. In *Markham* v. *Allen,* 326 U.S. 490, for example, this Court held that a district court, called upon in a suit by the federal Alien Property Custodian to decide a question of state probate law, properly exercised its discretion in declining to remit the government to state probate proceedings. In *Propper* v. *Clark,* 337 U.S. 472, the Court followed the same course in another suit by the Alien Property Custodian involving a question of state law that had not been definitively resolved by the New York courts.

Leiter Minerals, Inc. v. *United States,* 352 U.S. 220, the only decision requiring what might be characterized as limited abstention in a suit brought by the United States, involved quite unusual circumstances. The government sued in federal court to protect its lessee's possession of certain land in Louisiana, and to quiet its title to the underlying minerals. The defendant had previously filed a possessory action in the Louisiana state courts. Holding that the government suit was essentially defensive, and that the United States should be permitted to choose its forum (352 U.S. at 228), the Court sustained an injunction against the state possessory suit. In addition, however, the Court noted the government's claim that the applicable Louisiana statute, if construed adversely to the government, would be unconstitutional as an impairment of the obligation of contracts. In view of this constitutional issue and uncertainty surrounding construction and application of the Louisiana law, the Court

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modified the injunction against the state suit to permit a definitive interpretation of the state statue in the state court. The federal court, of course, nevertheless retained jurisdiction over the action by the United States.

No question of the constitutionality of the state's laws analogous to *Leiter Minerals* is presented here. Moreover, unlike *Leiter Minerals,* petitioners here do not seek to have the state courts initially pass on unclear questions of state law (there are none), leaving the final decision with the federal court;[32] petitioners instead seek to oust federal jurisdiction over the United States' suit altogether.

Petitioners also rely upon *Burford* v. *Sun Oil Co.,* 319 U.S. 315, which they describe as "particularly analogous to the circumstances of this case" (Br. 11). In fact, *Burford* is wholly inapposite. The federal suit there was by a private party challenging an order of a state administrative agency on grounds of state law and federal due process (*id.* at 317). The Court's decision to require abstention [33] rested on the basis that "difficult state questions" might be involved (*id.* at 331) and on the principle that review of orders of state administrative agencies deciding state law issues, in the first instance, ought to be in the state courts in order to avoid "federal-state conflict" (*id.* at 332–

[32] Even in *Leiter Minerals* (352 U.S. at 229–230), the Court cautioned that: "It need hardly be added that the state courts in such a proceeding can decide definitively only questions of state law that are not subject to overriding federal law."

[33] Mr. Justice Frankfurter, joined by three other Justices, dissented, in part, on the ground that the controlling state law was not uncertain (*id.* at 339–342).

334).[34] In the instant case, of course, the bulk of the complaint consists of purely federal claims; other claims do not involve unsettled questions of state law; and we are not concerned here with federal review of the order of a state administrative agency deciding state law questions.

In the light of the foregoing, it is difficult to understand petitioners' insistence that the abstention doctrine applies. That contention cannot be sustained on the basis of the McCarran Amendment because it was not intended to affect the affirmative jurisdiction of the federal courts over water suits by the United States.

Petitioners have attempted to support their abstention argument by relying upon cases involving natural resources. *E.g., Pacific Live Stock Co.* v. *Oregon Water Bd.,* 241 U.S. 440 (water); *Kaiser Steel Corp.* v. *W. S. Ranch Co.,* 391 U.S. 593 (*per curiam*) (water);

[34] *Alabama Public Service Commission* v. *Southern Ry. Co.,* 341 U.S. 341, which petitioners also cite (Br. 22), similarly rested on the ground that the federal court in the circumstances of that case should not pass on plaintiff's Fourteenth Amendment Due Process and state law challenge to the order of a state administrative agency; rather, in order to avoid needless friction between the state and federal government, the plaintiff should seek review in the state court (*id.* at 350).

Mr. Justice Frankfurter, joined by Mr. Justice Jackson, concurred on other grounds, but added that (*id.* at 361):

"The only reason for declining to entertain the suit is that it may well be more desirable as a matter of State-Federal relations for the order of a State agency to be reviewed originally in the State lower court and not to be challenged in the first instance in a federal court. It is not for me to quarrel with the wisdom of such a policy. But Congress, in the constitutional exercise of its power to define the jurisdiction of the inferior federal courts, has decided otherwise."

Burford v. *Sun Oil Co., supra* (oil); *Reetz v. Bozanich, supra* (fishing). But the mere involvement of natural resources is not a basis for abstention. We have already discussed the *Burford* case and the grounds for decision there; as to *Kaiser Steel Corp.* and *Reetz,* both decisions rested on the fact that controlling questions of "novel" (*Kaiser Steel, supra,* 391 U.S. at 594) or "uncertain" (*Reetz, supra,* 397 U.S. at 87) state law were presented.

Pacific Live Stock, on the other hand, did not even involve abstention. The Court sustained the constitutionality of Oregon's water law under the Fourteenth Amendment. It held in addition that an attempt to remove the state's administrative water proceeding to federal court provided no basis for an injunction to protect the federal court's jurisdiction, because that court had remanded the case to the state agency. The Court further held that plaintiff's pending diversity actions were private suits to prevent encroachment upon the plaintiff's water rights, and thus completely different from the quasi-public proceeding under state law that the plaintiff sought to enjoin. 241 U.S. at 447.

Far from supporting petitioners' abstention argument, *Pacific Live Stock* indicates that "where the same matter is brought before courts of concurrent jurisdiction, the one first obtaining jurisdiction will retain it until the controversy is determined, to the entire exclusion of the other, * * *." 241 U.S. at 447. This is, as the court of appeals held in this case (Pet. App. 12a), the usual rule when jurisdiction over a *res* is

concerned. *Princess Lida* v. *Thompson,* 305 U.S. 456, 466; *Penn General Casualty Co.* v. *Pennsylvania,* 294 U.S. 189, 195. On the other hand, "where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other." *Princess Lida* v. *Thompson, supra,* 305 U.S. at 466. Petitioners (Br. 32) apparently view Colorado's water proceedings in Division No. 7 as *in rem* or *quasi in rem,* since they permit service by publication. But however characterized, the state proceeding provides no basis for abstention under the test of *Pacific Live Stock* and *Princess Lida.*[35]

2. *Younger* v. *Harris,* 401 U.S. 37, and the line of decisions following it, some of which petitioners cite (Br. 17–21), have no bearing on the question here. Those cases generally involved federal suits by private plaintiffs for injunctive or declaratory relief against state criminal statutes that allegedly deprived them of

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[35] Petitioners also rely (Br. 12) upon *Allegheny Airlines* v. *Pennsylvania Public Utility Commission,* 465 F.2d 237 (C.A. 3). In that case, the court held that a declaratory judgment complaint, alleging that a carrier was exempt from state regulation because its activities were in interstate commerce, was properly dismissed by a federal court because the plaintiff was simply seeking a determination, in advance of the state proceeding, of the carrier's federal defense. Cf. *Public Service Commission* v. *Wycoff Co.,* 344 U.S. 237. Here the government is asserting affirmative federal claims. Contrast *Gay* v. *Board of Registration Commissioners,* 466 F.2d 879 (C.A. 6), holding that when state law is not controlling, will not contribute to avoidance of a federal constitutional question, and is not entangled in a skein of state regulations, abstention is inappropriate.

their First Amendment rights [36] or, in one instance, a state civil proceeding closely "akin to a criminal prosecution" that allegedly had the same effect. *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 604.[37]

The cases—whether deciding in favor of or against federal relief—rest in large measure upon "the fundamental policy against federal interference with state criminal prosecutions" (*Younger* v. *Harris, supra,* 401 U.S. at 46)—a principle of comity that obviously is irrelevant to this case. Moreover, regardless whether this Court subsequently decides to extend *Younger* generally to federal suits involving state civil statutes, the basic problem involved in all of these cases is the possible adverse effect on federal-state relations caused by depriving state courts of the first opportunity to pass upon the constitutionality of the laws of their own state [38]—again, an obviously irrelevant consideration in this case, quite aside from the important difference that here it is the United States that has sued in its own court. Petitioners' only point thus might be that because the state courts are available, the choice of a federal forum by the United States aggravates federal-

[36] *Samuels* v. *Mackell*, 401 U.S. 66; *Boyle* v. *Landry*, 401 U.S. 77; *Perez* v. *Ledesma*, 401 U.S. 82; *Dyson* v. *Stein*, 401 U.S. 200; *Byrne* v. *Karalexis*, 401 U.S. 216; *Mitchum* v. *Foster*, 407 U.S. 225; *Steffel* v. *Thompson*, 415 U.S. 452; *Ellis* v. *Dyson*, No. 73–130, decided May 19, 1975; *Hicks* v. *Miranda*, No. 74–156, decided June 24, 1975; *Doran* v. *Salem Inn, Inc.*, No. 74–337, decided June 30, 1975.

[37] In *Huffman*, the Court further pointed out, as a reason for deferring to the state court, that "the constitutional issue [in the case] involves a [state] statute which is capable of judicial narrowing." 420 U.S. at 609.

[38] See also n. 37, *supra*.

state relations and, therefore, should not be respected by the federal courts. There is nothing to support such an assertion, which in any event is contrary to our federal system and its history over the past two centuries. It is, in short, petitioners' position—not the United States'—that would alter the traditional federal system of government by barring the United States from access to its own courts.

III

DETERMINATION OF INDIAN AND FEDERAL WATER CLAIMS IN FEDERAL COURT WILL NOT INTERFERE WITH STATE PROCEEDINGS

A. IMPORTANT PRACTICAL BENEFITS RESULT FROM WATER RIGHTS SUITS BY THE UNITED STATES IN FEDERAL COURTS

As we have discussed above, an affirmative suit by the United States in federal court for a determination of Indian and federal government water rights serves the basic purpose of the Amendment: to expose such claims to adjudication unsheltered by sovereign immunity. Such suits also have significant practical advantages over joinder of the United States as a defendant in state proceedings.

First, the federal suit can result in a complete determination, including Indian rights, which can then be incorporated in the final state tabulation of all decreed rights. The federal courts have jurisdiction to determine Indian water rights when put in issue by the United States as trustee under 28 U.S.C. 1345 (and 1331). Cf. *Heckman* v. *United States,* 224 U.S.

413; *United States* v. *Board of Commissioners of Osage County,* 251 U.S. 128. On the other hand, it appears that state courts have not been granted jurisdiction over Indian water rights in the McCarran Amendment or in other statutes permitting state civil jurisdiction over Indians (see discussion, *infra,* pp. 52–62).

Second, injection into state water proceedings of the difficult questions of federal law surrounding determination of federal reserved rights confronts the state tribunal with questions alien to the usual priority questions presented in state water adjudications. The federal courts are expert in such issues.

The typical rule in the western states dates priority from actual diversion or application and makes rights granted currently junior to rights applied for or decreed in previous years. *Summary-Digest, supra,* n. 11, at Part I, p. 32. Such state rules are inapplicable to Indian and most federal reservations and lands whose water rights are controlled by the federal reserved rights doctrine.

The federal principle dates priority from the creation of the federal reservation. *Winters* v. *United States, supra; Arizona* v. *California, supra.* Many of these reservations were set aside more than fifty years ago. State judges ordinarily determine relatively narrow state law questions such as when the water was actually applied to a beneficial use, the extent of its use (*e.g.,* acres irrigated), and the amount of water needed. When confronted with federal claims, however, the state water judges must determine the purpose of the federal reservation, the relationship of the

water claimed to that purpose, and the quantity of water needed for future uses within that purpose. To do this they must consider Indian treaties, Acts of Congress, and presidential and departmental orders under various statutory delegations, which were adopted long ago, and with which state courts are generally unfamiliar. The federal issues must, therefore, by their very nature be considered separately from the typicaly simpler state law issues which control private appropriations of water. Federal courts, on the other hand, particularly in the west, are expert in dealing with matters relating to federal reservations, because they are the principal tribunals for conduct of federal land, reclamation, and Indian litigation. They are thus ideal forums in which to conduct such proceedings.

Third, affirmative suits in the district courts assure a federal forum for appellate review of federal law issues in the courts of appeals, rather than in this Court. If the state tribunals alone decide the federal questions raised here, this Court will be the sole federal tribunal to which the parties can bring their claims of error to resolve those questions. See *Eagle County, supra,* 401 U.S. at 526. The burden on this Court would be substantially minimized by proceedings originating in the federal district court. Indeed, the availability of that jurisdiction was a significant factor in this Court's decision to dismiss the original suit in the Pyramid Lake case (*United States* v. *Nevada,* 412 U.S. 534) with the express suggestion that the United States assert its claims in the federal district court.

Fourth, Indian and government rights decreed in federal courts can be integrated into state general adjudications as easily as rights previously decreed in state tribunals. This can be conveniently demonstrated in the specific context of Colorado's water law, although we believe the principle to be applicable throughout the nation.

B. FEDERAL DECREES CAN EASILY BE INTEGRATED INTO COLORADO'S GENERAL ADJUDICATION

Until recently, water rights in Colorado were adjudicated in seventy separate "water districts," which, for the most part, did not encompass entire watersheds.[39]

In 1969, Colorado adopted its "Water Right Determination and Administration Act," consolidating the seventy districts into seven "water divisions," the boundaries of which largely correspond to the State's major watersheds. Colo. Rev. Stat. 37-92-201 (1973). See Greer, *A Review of Recent Activity in Colorado Water Law,* 47 Den. L.J. 181 (1970).

Colorado's 1969 Act provides for two types of pro-

[39] See Colo. Rev. Stat. 148-9-1—148-9-21, 148-13-1—148-13-70 (1963 [repealed]); see also *O'Neil* v. *North'n Colorado Irrigation Co.*, 242 U.S. 20; *Ft. Lyon Canal Co.* v. *Arkansas Valley Sugar Beet Co.*, 39 Col. 332, 90 Pac. 1023. Colorado is one of only three western states in which a permit is not required to appropriate water from surface sources. *Summary-Digest, supra* n. 11, at Part I, p. 14. Under the former Colorado law, water rights were determined in each district first in an "original" adjudication and then in periodic "supplemental" adjudications designed to add all rights established since the original decree. See Colo. Rev. Stat. 148-9-3—148-9-7 (1963 [repealed]). See 2 Hutchins, *Water Rights Laws in the Nineteen Western States*, 470 (1974) for a comprehensive discussion of the development of Colorado water law.

ceedings: applications for confirmation of individual rights, and the tabulation and general adjudication of all previously decreed water rights. The first type of proceeding "makes each water court an administrative agency with complete records of and supervision over newly initiated and incomplete water rights." Trelease, *Water Law* 138 (2d ed. 1974). It requires an application, notice by mail and publication of monthly lists of applications filed, an opportunity for interested persons to protest before water referees and the division water judge, and a decree defining the applicant's water right in terms of amount and priority. Colo. Rev. Stat. 37-92-301—37-92-306 (1973). One extremely important limitation is that priorities for all rights awarded under the Act during the current year are junior to rights applied for in previous years or decreed prior to June 7, 1969. Colo. Rev. Stat. 37-92-306 (1973).

The second type of proceeding completes the process of general adjudication by providing for the integration of all individual decrees into judicially confirmed tabulations for each water source and for the entire Division. Each Division Water Engineer is to prepare such tabulations and file them in the water court. After notice and opportunity for protest, the tabulations will be confirmed by judicial decree. Under recently enacted legislation, hearings on the completed tabulations are to begin in the fall of 1982. Colo. Rev. Stat. 37-92-401—37-92-402 (1973), as amended by the Act of July 1, 1975.

The process of tabulation has been under way for

some time. It has required the integration of water rights decrees entered in each of the separate districts from which the division was formed. See, Colo. Rev. Stat. 37-92-401(1)(b) (1973); Greer, *supra*, 47 Den. L.J. at 184.[40] In Water Division No. 7, for instance, decrees from eight separate state water districts were listed and a past federal decree determining water rights has been incorporated in the same manner.

The decree in *United States* v. *Morrison Consolidated Ditch Co.* (D. Colo., Equity No. 7736, decided October 25, 1930), adjudicated the water rights of a portion of the Southern Ute Reservation on the Pine (Los Pinos) River, a tributary of the San Juan. Under the decree, thirteen Indian ditches with a priority date of July 25, 1868, have been incorporated into the revised priority list for Water Division No. 7.[41]

No new adjudication was required to establish either the state decrees from the old water districts, or the past federal decrees. The results of the present federal proceeding can as easily be incorporated into the tabulations of rights on the various streams in

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[40] There have commonly been a number of adjudications over time within each district—an "original" adjudication and periodic "supplemental" adjudications designed to add all rights initiated since the original decree. Colo. Rev. Stat. 148-9-3—148-9-7 (1963 [repealed]). Hutchins, *supra* n. 39, at 474–475. Former districts numbered 29–34, 46, and 69 were consolidated into Division No. 7. Compare former Colo. Rev. Stat. 148-13-30—148-13-35, 148-13-69 (1963) with current Colo. Rev. Stat. 37-92-201(1)(g).

[41] We have included as an exhibit to this brief a copy of the explanatory cover page, and the priority list for the Los Pinos River in Water Division No. 7 on which the rights established in the *Morrison Ditch* case appear as "basin rank" number 1.

Division No. 7. In effect, the federal proceeding isolates the claims of the United States and provides for their determination by the federal court separately from the monthly lists of new applications in the state courts, subject, however, to integration into the general adjudication of tabulations scheduled for 1982.

Petitioners argue that this procedure would result in "a piecemeal solution of a larger problem" (Br. 31) and would mean "duplicative proceedings in two courts presiding simultaneously over one resource" (Br. 9).

These contentions ignore the differences among (1) the determination of the government's claim to water rights previously vested under federal law, (2) Colorado's procedure for adjudication of new applications for individual water rights under the State appropriation doctrine, and (3) the State's procedure for integrating in a general adjudication the tabulated rights of all water users, however and wherever those rights were previously decreed.

The fact that two courts will simultaneously be considering water rights questions in the same watershed is not, in itself, a cause for concern, because they will be determining different questions. The federal court will be deciding the Indian and federal claims under federal law. The state court will continue the month-to-month determination of new applications under the 1969 Act. The two proceedings will merge in the final tabulation of decreed rights.

Indeed, for the reasons explained above (pp. 44–45, *supra*), if the federal issues were presented in the state proceeding, its character would be drastically

changed, and it would be necessary for the state court to separate those issues from the customary month-by-month proceeding. The holders of decreed rights in Water Division No. 7 ordinarily do not become parties to the on-going proceeding because, under the State's law, priority in current proceedings is junior to decrees and applications filed in prior years. However, injection of the United States' claims into the case would require that they appear if they wish to challenge the government's claims. In effect, the state court itself must conduct separate proceedings.

Conduct of the separate proceeding in the federal court is not incompatible with the policy of the McCarran Amendment. It is desirable, of course, that administration of any watershed be unified. In times of water shortage, it is efficient for a single authority to have the power to enforce priorities and see that senior rights are respected. But most watersheds are interstate—as is the San Juan—and beyond complete administration by the States except by compact.

Within the States, there is no procedural reason why all water rights must be decreed in the same judicial proceeding, so long as all decrees are ultimately integrated. Otherwise, administration of Colorado watersheds would be impossible, since, as we have noted, rights in its watersheds have been decreed in numerous separate proceedings, including federal proceedings.

Sound procedure for adjudication of claims by any single person or entity may require that notice be given other users so that if adversely affected they may appear and challenge the rights being asserted. See *O'Neil* v. *North'n Colorado Irrigation Co.*, 242 U.S.

20. Thus, in its federal suit, the government has sought to join all using the waters of the streams listed in its complaint.

It should not be necessary for private water users whose rights have already been established in previous adjudications to relitigate those rights in federal suit. It is true that their rights are not strictly *res judicata* as to the United States, because the government has generally not been a party to the adjudications in which they were established. Cf. *Gutierres* v. *Albuquerque Land Co.*, 188 U.S. 545, 556–557. However, the United States recognizes these water rights decrees as *prima facie* evidence of the rights they set forth, and they would only be challenged if the government held a junior priority to them, and investigation revealed some serious discrepancy between the listed rights and the actual water use they represent.[42] In such a case (which we would anticipate to be rare), the factual hearings could certainly be held locally by a special master.

Finally, there is no reason to expect duplication in the actual administration of the watershed. The United States' complaint asks the appointment of a water master to enforce the court's decree on a continuing basis. If such relief is granted, the master would merely monitor the state administrative system

[42] The United States would have the right to challenge these prior decrees (and possibly require that they be relitigated) even if it were a party to the *state* court adjudication, for, absent notice, the essential prerequisities for *res judicata* against the government would be lacking. The federal proceeding thus poses no greater potential burden on the individual water users than does the state proceeding.

to ensure compliance with the rights recognized by the district court.

The only arguably serious "practical" objection raised by petitioners in this connection is the fact that the federal district court for Colorado is located in Denver, "some 300 miles distant" (Pet. Br. 5) from Water Division No. 7. But any burdens on petitioners resulting from the district court's location could be minimized by appointment of a special master (as is common in water rights cases) to hold local hearings on the necessary factual determinations, to the extent that parties opposing the government's claims wish to present evidence After such hearings, when the Indian and government rights are finally decreed under federal law, they can be integrated into the tabulations in Water Division No. 7 in terms of priority dates and quantity, in the same way as the rights of nonfederal water users decreed under state law.[43]

IV

FEDERAL COURTS ALONE HAVE JURISDICTION OVER CLAIMS FOR DETERMINATION OF INDIAN WATER RIGHTS

A glance at the map enclosed shows that a substantial part of Colorado Water Division No. 7 consists of the Ute Mountain Ute and the Southern Ute Reservations. The reserved water rights asserted by

[43] While we anticipate that the district court's decree will recognize that the two Indian tribes are entitled to water rights of a specified quantity, the United States has always taken the position that those rights may be modified in subsequent proceedings should the needs of the tribes increase. See *Conrad Inv. Co.* v. *United States*, 161 Fed. 829, 835 (C.C.A. 9).

the United States as trustee for those tribes are the first claims listed in the complaint. The presence of these Indian claims to reserved rights in the waters of the San Juan and its tributaries distinguishes this suit from proceedings in other Colorado Water Divisions in which the United States has asserted federal claims for non-Indian reserved and appropriative water rights. Because of the Indian claims, we believe the suit *must* be brought in federal court.

However, whether the McCarran Amendment waives immunity to the extent of permitting state court jurisdiction over the reserved water rights of Indians need not be decided, unless the Court rejects the contentions we have made above, and concludes that the federal courts do not have jurisdiction over non-Indian water claims asserted by the United States; or that even if they do, that the doctrines of abstention and comity require that such claims be remitted to the state courts.

The argument that Indian water rights are subject to the McCarran Amendment can be simply stated. In *Eagle County,* this Court held that all water rights of which "the United States is the owner" (43 U.S.C. 666(a))—appropriative, riparian and reserved—fall within the Amendment's all-inclusive waiver of immunity, which contains no exceptions. 401 U.S. at 524. As trustee for the Indian tribes, the argument would continue, the United States "owns" their water rights for their beneficial use. Therefore, all Indian rights for which the United States is trustee are included.

We submit that the argument is unsound. It ignores the unique legal status of Indian property and juris-

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dictional rights, as defined in this Court's decisions; it overlooks the express language of 25 U.S.C. 1322(b) and 28 U.S.C. 1360(b) denying state court jurisdiction to adjudicate Indian water rights for which the United States is trustee; and it disregards the crucial fact that the relationship between the McCarran Amendment and those rights was not an issue in *Eagle County*.

This Court has recognized that "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789. Congress has traditionally permitted state criminal and civil jurisdiction in Indian country only after the most comprehensive and detailed scrutiny and only by a clearly defined grant of jurisdiction. See, *e.g.*, *Kennerly* v. *District Court of Montana*, 400 U.S. 423, 424, n. 1, 427; *Williams* v. *Lee*, 358 U.S. 217, 218–221; *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 168, 172; *United States* v. *Mazurie*, 419 U.S. 544, 556–559.

Indians continue to be recognized as a distinct and separate people[44] (*McClanahan* v. *Arizona State Tax Commission, supra; United States* v. *Mazurie, supra*), whose rights and property on their reservations are the primary responsibility of the federal government under its duty to protect them as its wards. Cf. *Morton* v. *Mancari*, 417 U.S. 535, 551–553.

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[44] In the Indian Appropriation Act of March 3, 1871, 16 Stat. 566, 25 U.S.C. 71, Congress barred dealings with Indian tribes as independent nations. See *Antoine* v. *Washington*, 420 U.S. 194, 201–204. See also *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148.

The Court explained the derivation of these rules in *United States* v. *Kagama*, 118 U.S. 375, 383–384:

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen. [Emphasis in original.]

Out of this obligation to protect the Indians has arisen the general rule that the state courts have no jurisdiction over Indian property rights on the reservation unless it is expressly conferred by Congress. Cf. *Minnesota* v. *United States*, 305 U.S. 282, 389–390; *McClanahan* v. *Arizona State Tax Commission, supra*. For "[o]nce the United States was organized and the Constitution adopted * * * tribal rights to Indian lands became the exclusive province of the federal law." *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 667. Among these property rights, water rights are indispensable since without them the land set aside in Indian reservations might be

useless. *Winters* v. *United States,* 207 U.S. 564; *Arizona* v. *California,* 373 U.S. 546, 595–601; *United States* v. *Powers,* 305 U.S. 527.[45] Thus, absent an explicit grant by Congress of jurisdiction to the States to determine Indian water rights in their courts, the States are without jurisdiction over this subject matter.

Indian water rights, whether expressly defined in agreements creating reservations, or implied under the *Winters* doctrine, are unlike other water rights held by the United States. As recognized in *Arizona* v. *California, supra,* 373 U.S. at 601, the principles of the reserved rights doctrine are the same whether Indian or non-Indian federal claims are involved (see n. 50, *infra,* p. 62). But even when the United States is trustee for the Indians, the water rights belong to them, not to the federal government. The government's "ownership" status as trustee is simply an incident of the special obligation to protect the Indians, which the United States assumed when it occupied their ancestral lands. Cf. *Morton* v. *Mancari, supra.* In the words of the Final Report of the National Water Commission (n. 23, p. 29, *supra*) at 477:

> Indian water rights are different from Federal reserved rights for such lands as national parks and national forests, in that the United States is not the owner of the Indian rights but is a trustee for the benefit of the Indians. While the United States may sell, lease, quit claim, release, or otherwise convey its own

[45] See also *United States* v. *Ahtanum Irrigation District,* 236 F. 2d (C.A. 9); *United States* v. *Walker River Irr. Dist.,* 104 F. 2d 334 (C.A. 9).

> Federal reserved water rights, its powers and duties regarding Indian water rights are constrained by its fiduciary duty to the Indian tribes who are beneficiaries of the trust.

The fiduciary considerations to which the Commission refers constrain Congress, as much as they do other branches of the United States Government. Thus, it has long been a general principle of construction that congressional intention to affect Indian property rights must be clearly expressed, and that any ambiguity is to be resolved in favor of the Indians. See, *e.g., Antoine* v. *Washington,* 420 U.S. 194, 199–200; *Winters* v. *United States, supra; Choate* v. *Trapp,* 224 U.S. 665, 675. A statute that subjects Indian tribes to defense of their property rights in the state courts falls clearly within this rule.

This follows because one surviving attribute of Indian sovereignty is exemption from suit absent an express waiver of immunity by Congress. *Turner* v. *United States,* 248 U.S. 354. This has not changed because the United States is trustee for the Indians. It is "as though the immunity which was theirs as sovereigns passed to the United States *for their benefit,* as their tribal properties did." *United States* v. *U.S. Fidelity Co.,* 309 U.S. 506, 512 (emphasis added).

Congress has the power to subject federal property to suit in state or federal courts by waiving the sovereign immunity of the United States. But because of the United States' fiduciary obligations to the Indians, Congress has been more circumspect about waiving immunity which subjects their property to suit in state courts.

For example, in Pub. L. 280, Act of August 15, 1953, 67 Stat. 589, Congress granted civil jurisdiction in Indian country to five named States (not including Colorado), and established an optional procedure by which all other States could acquire such jurisdiction if they wished it. In 1968, Congress declared, Title IV, Pub. L. 90–284, Act of April 11, 1968, 82 Stat. 79, that the optional procedure would apply only "with the consent of the Indian tribe occupying the particular Indian country * * * affected." 25 U.S.C. 1322(a). Colorado has never invoked this procedure and no tribe in Colorado has consented to it.

Of more immediate and controlling significance in this case is the limitation Congress placed upon this consent by expressly excluding from it tribal property, including water rights, held in trust by the United States. 25 U.S.C. 1322(b); 28 U.S.C. 1360 (b).[46] This enactment, one year after the McCarran Amendment and reaffirmed in 1968, forecloses the highly technical contention that because the United States is "owner" of the water rights it holds in trust for the Indians, those rights are included under the McCarran Amendment.

Neither the language nor the history of the Amend-

[46] "(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, *including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States* or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; *or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.*" (Emphasis added.)

ment reflects a purpose to subject Indian rights to suit in the state courts. The Amendment does not refer to Indian water rights. Indeed, they were mentioned only briefly during the hearings on the bill by the Department of Justice witness opposing it (see testimony of William Veeder, Senate Hearings 6–7, 12–13, 18), and in the Department of the Interior's letter cataloguing the various kinds of water rights in which the United States was interested in one capacity or another. Although Interior's letter outlined as an alternative to S. 18 a proposal that would have expressly excluded Indian water rights from the consent to suit under consideration by the Senate (n. 18, pp. 24–25, *supra*), there is no indication in the Senate Report (S. Rep. No. 755, *supra*), or in the remarks by Senator McCarran explaining the bill (97 Cong. Rec. 12947–12948 (1951)), that the legislation involved Indian rights. The Senate Report did not, in its review of the reasons for the legislation, even mention the reserved rights doctrine of *Winters* v. *United States, supra*,[47] as applied to Indian water rights. S. Rep. No. 755, *supra*, at 2–7.

Nor was anything said on the floor of either chamber indicating that Indian water rights were to be included. Apparently recognizing that the record was unclear on this matter, Senator Chavez of New

[47] A brief colloquy in the hearings between Senator Watkins and Mr. Veeder mentioned the role of the United States as trustee for the Indians but this was in connection with the Senator's belief, which Mr. Veeder was contesting, that the United States had conceded the ownership of various streams to the States (Senate Hearings 12–13). The Senator and Mr. Veeder also discussed the role of the United States as trustee under the reclamation laws (Senate Hearings 14–16).

Mexico questioned Senator McCarran following the latter's explanation of S. 18, which had not mentioned Indians. Senator Chavez asked specifically whether Indian water rights for which the United States was trustee were to be included in the catalogue of federal water rights proposed in Section 2 of the reported bill. He did not refer at all to the waiver of immunity in Section 1. Senator McCarran seemed to answer negatively (97 Cong. Rec. 12948 (1951)).[48] We submit that this history does not reflect the detailed and comprehensive scrutiny to which this Court referred in *Kennerly* v. *District Court of Montana, supra,* 400 U.S. at 427.

Finally, no issue concerning the relationship between reserved Indian water rights held by the United

[48] "Mr. CHAVEZ. I am happy the Senator from Nevada has made a statement explaining the purpose of the bill and the reasons for it. I have no objection to the bill. I know what it means to my State. But I should like to ask a question. If the Interior Department is made the repository of water rights, be they in the United States Government or in individual citizens, does that mean that Indian rights will also be integrated?

"Mr. MCCARRAN. No. All that the bill provides is that the Interior Department shall be a repository for the rights that have been acquired and are held by the United States, so that one seeking to determine water rights on a given stream may know what rights, if any, are claimed by the Government.

"Mr. CHAVEZ. Does the Government claim those rights as the Government, or could it act as trustee, let us say, for a tribe of Indians?

"Mr. MCCARRAN. It could act as a trustee, I suppose. But, Mr. President, there is a deeper and more far-reaching purpose. If my time has not expired——

"The PRESIDING OFFICER. The time of the Senator has expired."

States as trustee, and the scope of the McCarran Amendment, was before this Court either in the *Eagle County* case, or its companion suit, *United States* v. *District Court for Water Div. No. 5, supra*.[49] As we have indicated above, that issue is governed by different legal and historical principles than those that apply to the waiver by Congress of immunity with respect to non-Indian federal property, and the relevant considerations were not fully briefed or argued

[49] References in the government's brief in *Eagle County* to *Winters* v. *United States* were in support of its general view of the reserved rights doctrine, which applied to the non-Indian federal water rights involved (*Arizona* v. *California, supra*), and its claim, ultimately rejected, that the McCarran Amendment was limited to rights defined by state law. Brief for the United States, No. 87, O.T. 1970, pp. 6, 9, 10–11. The government specifically noted in its brief in *Water Division No. 5* that Indian rights were not involved. Brief for the United States, No. 812, O.T. 1970, pp. 10–11, n. 3.

After the decisions in the two cases were announced, the Fort Mojave Tribe of Indians moved for leave to file a suggestion of interest, and supporting points and authorities. The Indians argued that the tribe was an indispensable party to the litigation, that this Court lacked jurisdiction, and that the case should therefore be dismissed. Attached to its *Eagle County* brief as an appendix was a report prepared in the Bureau of Indian Affairs by William H. Veeder (who had testified on the McCarran Amendment). Mr. Veeder asserted that the Department of Justice, because of conflicts of interest, had improperly failed to argue that Indian rights are outside the scope of the statute, and that the United States was not a necessary party to the state water adjudications. The motions for leave to file were denied. 402 U.S. 940. Since no case or controversy concerning Indian water rights was before the Court, any discussion of the merits of this question by the Court would have been inappropriate.

in those cases.[50] Neither *Eagle County* nor *Division No. 5,* therefore, bear on the jurisdiction of state courts over Indian water rights held by the United States as trustee.

Although we conclude that the McCarran Amendment did not subject such rights to state jurisdiction, it is, in our view, unnecessary for the Court to reach this question. As we argued above, Congress did not bar the United States from suing in the federal courts to assert Indian and non-Indian federal water rights; and neither the abstention nor the comity doctrines permit the district courts to abstain from exercising their jurisdiction over such suits in favor of an after-filed joinder of the United States in a state water adjudication.

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[50] Since *Eagle County* held that the McCarran Amendment includes reserved federal rights, and since this Court did not expressly hold that the *Winters* doctrine extends to non-Indian federal establishments until 1963, when *Arizona* v. *California, supra,* was announced, it might be argued that the only reserved rights Congress could have had in mind in 1952 were those reserved to the Indians. The argument fails because the *Winters* case itself held that the government has power to reserve water and exempt it from appropriations under state law. 207 U.S. at 577. See also *United States* v. *Walker River Irr. Dist.*, 104 F. 2d 334, 336 (C.A. 9), holding that a statute or executive order, as well as an Indian treaty, may reflect an intent to reserve water as well as land. Thus, the reserved rights doctrine was not limited to Indian reservations when the McCarran Amendment was passed (see also discussion, *supra,* p. 13).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1975.

APPENDIX

IN THE MATTER OF TABULATION IN ORDER OF SENIORITY OF ALL DECREED WATER RIGHTS AND CONDITIONAL WATER RIGHTS IN THE DRAINAGE BASIN OF THE LOS PINOS RIVER LOCATED IN FORMER WATER DISTRICT NO. 31 AND IN WATER DIVISION NO. 7.

REVISED PRIORITY LIST

Notice is hereby given that pursuant to Section 148-21-28, C.R.S. 1963, as amended, the Division Engineer of Water Division No. 7 has made such revisions as he deems proper to the July 10, 1974 tabulation of absolute and conditional decreed water rights, including omission or modification of water rights which he has determined to have been abandoned in whole or in part.

The revised tabulation does not include water rights decreed under the provisions of Section 148-21-20, C.R.S. 1963, as amended, and may not include certain water rights in those proceedings under Section 148-21-44, C.R.S. 1963, as amended.

The Division Engineer has made separate Revised Priority Lists so that only those water rights which take or will take water from the same source and are in a position to affect one another will be on the same list.

The Revised Priority List will be available after October 10 in the offices of each Division Engineer, Water Commissioner and County Clerk and Recorder for inspection at any time during regular office hours. The Division Engineer will furnish or mail a copy of a Revised Priority List to anyone requesting the list upon payment of a fee of Five Dollars ($5.00).

Any person who wishes to protest the manner in which a water right or conditional water right is listed in the tabulation, including any revisions, or the omission of a water right or conditional water right from such tabulation shall file a written protest with the water clerk and with the division engineer not later than November 30. Such protest shall set forth in detail the facts and legal basis therefor. Service of a copy of the protest or any other document is not necessary for jurisdictional purposes, but the water judge may order service of a copy of the protest or any other document on any person and in any manner which he may deem appropriate. The fee for filing such protest with the water clerk shall be Twenty Dollars ($20.00).

EXPLANATION OF CODES USED IN THE REVISED PRIORITY LIST

Column (1) - This column indicates the type of STRUCTURE and is coded as follows:

D Ditch R Reservoir SE Seeps PL Pipeline PP Power Plant * Two or more
W Well SP Spring M Mine P Surface Pump O Other of the preceding

Column (WD) - The number signifies the former Water District. The following nine exceptions signify portions of the former Water Districts:

71 = District 34 72 = District 42 73 = District 42 74 = District 42 76 = District 48
77 = District 29 78 = District 29 79 = District 65 80 = District 23

Column (PM) - Code of the Principal Meridians required for LOCATION.

S Sixth Principal Meridian U Ute Principal Meridian
N New Mexico Principal Meridian C Costilla Survey

Column (TWN) or (RNG) - An (H) following either a township TWN or range RNG number indicates a half township or range.

Column (160) - The 160 acre quarter section.

Column (40) - The 40 acre quarter-quarter section.

Column (10) - The 10 acre quarter-quarter-quarter section.

Column (2) - The type of USE is coded as follows:

I Irrigation C Commercial R Recreation F Fire S Stock
M Municipal N Industrial P Fishery D Domestic O Other *** Combination of four or more or the previous

Column (Amount) - The units are coded: CFS Cubic feet per second
AF Acre feet

Column (3) - This column contains a code describing the TYPE OF ADJUDICATION

O Original TF Transfer From
S Supplemental TT Transfer To
C Conditional AP Alternate Point
CA Conditional to Absolute AB Abandonment

Dated this 1st day of October, 1974

Wayne H. Crosby, Division Engineer

C. J. Kuiper, State Engineer

BEST COPY AVAILABLE

OCTOBER 10, 1974

DIVISION 7 . LOS PINOS

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NAME OF STRUCTURE	TYP (1)	NAME OF SOURCE	LOCATION WD	M	TWN	RNG	S	160	40	10	USE (2)	AMOUNT	TYP ADJ (3)	ADJ DATE	PREV ADJ DATE	APPRO DATE	BASIN RANK
AGENCY DITCH	D	PINE RIVER	31	N	33-N	5 W	5	NESESW			IO	.7500CFS	O	10/25/1930		07/25/1860	1
BUCKSKIN DITCH	D	PINE RIVER	31	N	34UN	7-W	23	SWNENW			IO	2.5000CFS	O	10/25/1930		07/25/1860	1
CEANADO DITCH	D	PINE RIVER	31	N	34UN	7-W	18	NENWNE			IO	9.7500CFS	O	10/25/1930		07/25/1860	1
COMMISSIONER DITCH	D	PINE RIVER	31	N	34UN	7-W	26	SWNESE			IO	7.3100CFS	O	10/25/1930		07/25/1860	1
COMMISSIONER DITCH	D	PINE RIVER	31	N	34UN	7-W	26	SWNESE			IO	1.0000CFS	O	06/12/1934		07/25/1860	1
DALE DITCH	D	PINE RIVER	31	N	34UN	7-W	33	SWSWSW			IO	1.0000CFS	O	10/25/1930		07/25/1860	1
DR MORRISON DITCH	D	PINE RIVER	31	N	33-N	7-W	15	SESENE			IO	30.5000CFS	O	10/25/1930		07/25/1860	1
DR MORRISON DITCH	D	PINE RIVER	31	N	33-N	7-W	21	NESWSW			IO	29.7500CFS	O	10/25/1930		07/25/1860	1
DR MORRISON DITCH	D	PINE RIVER	31	N	33-N	7-W	24	SENWSE			IO	29.7500CFS	O	10/25/1930		07/25/1860	1
DR MORRISON DITCH	D	PINE RIVER	31	N	33-N	7-W	14	SESENE			IO	29.7500CFS	O	10/25/1930		07/25/1860	1
DR MORRISON DITCH	D	PINE RIVER	31	N	33-N	7-W	14	SESENE			IO	.5000CFS	O	10/25/1930		07/25/1860	1
DR MORRISON DITCH	D	PINE RIVER	31	N	33-N	7-W	14	SESENE			IO	1.0000CFS	O	10/25/1930		07/25/1860	1
DR MORRISON DITCH	D	PINE RIVER	31	N	33-N	7-W	24	NWSESW			IO	7.1700CFS	O	10/25/1930		07/25/1860	1
LA BOCA DITCH	D	PINE RIVER	31	N	33-N	7-W	24	NWSESW			IO	3.0000CFS	O	06/12/1934		07/25/1860	1
LA BOCA DITCH	D	PINE RIVER	31	N	33-N	7-W	24	NWSESE			IO	.5000CFS	O	10/25/1930		07/25/1860	1
LA BOCA DITCH	D	PINE RIVER	31	N	33-N	7-W	24	NWSESE			IO	1.0000CFS	O	10/25/1930		07/25/1860	1
MOORE DITCH	D	PINE RIVER	31	N	33-N	7-W	26	SWSWSW			IO	1.0000CFS	O	10/25/1930		07/25/1860	1
MOORE DITCH	D	PINE RIVER	31	N	33-N	7-W	26	SWSWSW			IO	.5000CFS	O	10/25/1930		07/25/1860	1
NANNICE DITCH	D	PINE RIVER	31	N	33-N	7-W	26	SWSWSW			IO	4.2500CFS	O	10/25/1930		07/25/1860	1
NANNICE DITCH	D	PINE RIVER	31	N	33-N	7-W	26	SWSWSW			IO	.5000CFS	O	10/25/1930		07/25/1860	1
SEVERO DITCH	D	PINE RIVER	31	N	33-N	7-W	26	SWSWSW			IO	81.1000CFS	O	10/25/1930		07/25/1860	1
SPRING CREEK DITCH	D	PINE RIVER	31	N	33-N	7-W	15	SENENE			IO	1.0000CFS	O	06/12/1934		07/25/1860	1
SPRING CREEK DITCH	D	PINE RIVER	31	N	33-N	7-W	15	SENENE			IO	.7000CFS	O	06/12/1934		07/25/1860	1
WAITS-GRANT DITCH	D	PINE RIVER	31	N	33-N	7-W	15	SESWNW			IO	3.0000CFS	O	10/25/1930		07/25/1860	1
WAITS-GRANT DITCH	D	PINE RIVER	31	N	33-N	7-W	15	SESWNW			IO	.5000CFS	O	06/12/1934		07/25/1860	1
WAITS-GRANT DITCH	D	PINE RIVER	31	N	33-N	7-W	15	SESWNW			IO	3.0000CFS	O	10/25/1930		07/25/1860	1
WAITS-GRANT DITCH	D	PINE RIVER	31	N	33-N	7-W	15	SESESW			IO	.5000CFS	O	06/12/1934		07/25/1860	1
WEST SIDE DITCH	D	PINE RIVER	31	N	33-N	7-W	15	SESESW			IO	24.7500CFS	O	10/25/1930		07/25/1860	1
WEST SIDE DITCH	D	PINE RIVER	31	N	34UN	7-W	11	SENENE			IO	24.7500CFS	O	06/12/1934		07/25/1860	1
BEAN DITCH	D	PINE RIVER	31	N	34UN	7-W	23	SWSWSW			IO	6.7900CFS	O	06/12/1934		07/25/1860	1
THOMPSON-EPPERSON DITCH	D	PINE RIVER	31	N	34UN	7-W	11	SWNESE			IO	11.5000CFS	O	06/12/1934		07/25/1860	1
LOS PINOS IRG DITCH	D	PINE RIVER	31	N	35-N	7-W	35	NESWNE			IO	5.2500CFS	O	06/12/1934		07/25/1860	1
WOHNER IRRIGATION DITCH	D	PINE RIVER	31	N	35-N	7-W	35	NESWNE			IO	84.0000CFS	O	06/12/1934		07/25/1860	1
BEAN CR AND PINE R DITCH	D	PINE RIVER	31	N	35-N	7-W	35	NESWNE			IO	3.5000CFS	O	06/12/1934		07/25/1860	1
CITIZENS IRR DITCH	D	PINE RIVER	31	N	35-N	7-W	11	NENWNE			IO	1.0000CFS	O	06/12/1934		07/25/1860	1
HIGBEE IRRIGATION DITCH	D	PINE RIVER	31	N	35-N	7-W	11	NENWNE			IO	2.0000CFS	O	06/12/1934		07/25/1860	1
WALLACE GULCH DITCH	D	WALLACE GULCH	31	N	35-N	7-W	29	SWSWSW			IO	3.3300CFS	O	06/12/1934		07/25/1860	1
MYERS AND ASHER DITCH	D	PINE RIVER	31	N	34-N	7-W	27	SESESW			IO	.3000CFS	O	06/12/1934		07/25/1860	1
KING DITCH	D	PINE RIVER	31	N	34-N	7-W	11	NWNWNE			IO	9.0000CFS	O	06/12/1934		07/25/1860	1
E C TAYLOR DITCH	D	PINE RIVER	31	N	36-N	6-W	11	NWSENE			IO	4.0000CFS	O	06/12/1934		05/15/1881	120
TAYLOR DITCH	D	VALLECITO	31	N	36-N	6-W	17	NWNWNW			IO	2.0000CFS	O	06/12/1934		05/15/1881	120
PALMER DITCH	D	RED CREEK	31	N	36-N	6-W	24	SWSWNW			IO	21.0000CFS	O	06/12/1934		05/15/1881	120
SCHRODER IRG DITCH	D	PINE RIVER	31	N	36-N	6-W	25	NWNWSW			IO	27.1200CFS	O	06/12/1934		05/15/1881	120
FARRELL DITCH	D	PINE RIVER	31	N	36-N	6-W	25	NESESE			IO	10.0000CFS	O	06/12/1934		05/15/1881	120
GRIMES DITCH	D	VALLECITO	31	N	37-N	6-W	32	NESESE			IO	1.2500CFS	O	06/12/1934		03/01/1882	120
GRIMES DITCH	D	VALLECITO	31	N	37-N	6-W	32	NESESE			IO	1.0000CFS	O	06/12/1934		03/01/1882	120
NEWSLEY SPRING DITCH	D	VALLECITO	31	N	36-N	6-W	29	SWSESE			IO	.5000CFS	O	06/12/1934		05/15/1881	120
ISLAND DITCH	D	PINE RIVER	31	N	34-N	7-W	11	NWSENW			IO	1.0000CFS	O	06/12/1934		07/01/1882	120
BENNETT-MYERS IRR DITCH	D	PINE RIVER	31	N	36-N	7-W	16	SESWSW			IO	4.0000CFS	O	06/12/1934		08/01/1882	120

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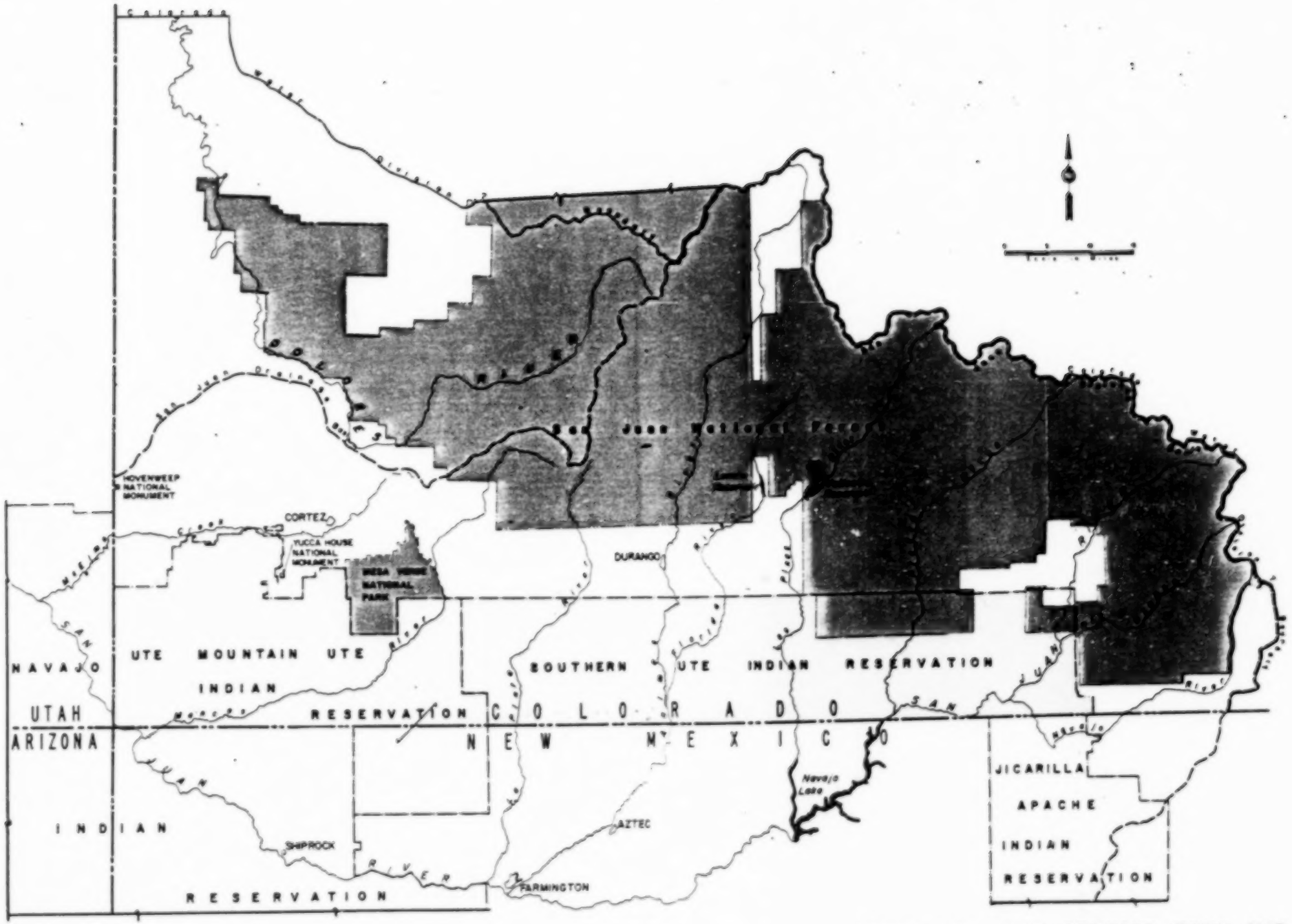

UPPER SAN JUAN DRAINAGE BASIN MAP